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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 5481

HERBERT PHILLIP SCHLANGER, PETITIONER

v.

ROBERT C. SEAMANS, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (App. 68) is unreported. The order and opinion of the district court (App. 65) are also unreported.

JURISDICTION

The judgment of the court of appeals (App. 68) was entered on May 20, 1970. A petition for rehearing (App. 80), with a request for rehearing *en banc,* was denied on June 17, 1970. On July 2, 1970, the petition for a writ of certiorari was filed; it was granted on October 19, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether habeas corpus jurisdiction can be invoked by a serviceman on active duty, seeking discharge from military service, in a judicial district other than one to which he has been assigned to fulfill his military obligation.

2. Whether petitioner's habeas corpus petition could be entertained in a jurisdiction where no respondent having custody and control over him is located.

STATUTES INVOLVED

28 U.S.C. 2241 provides:

> *Power to grant writ.*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress,

or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

* * * * *

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. [Supp. V.]

28 U.S.C. 2242 provides in part:

* * * * *

If addressed to the Supreme Court, a justice thereof or a circuit judge [the application for a writ of habeas corpus] shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. 2243 provides:

Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing

the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT

This is a habeas corpus action brought in the United States District Court for the District of Arizona by a serviceman seeking discharge from active military service in the Air Force on the ground of an alleged breach

by the Air Force of his enlistment contract (App. 3). The district court, finding that it lacked jurisdiction to entertain the petition for a writ of habeas corpus, granted respondents' motion to dismiss (App. 65); the court of appeals affirmed (App. 68), and denied a petition for rehearing *en banc* (App. 80).

1. Petitioner enlisted in the Air Force for a four-year period in December, 1962 (App. 3). In 1965, he applied for the Airman Education and Commissioning Program, a two-phase program in which the Air Force pays for an airman's education at a civilian university and, then, upon completion of a subsequent period of military training, awards him a commission. AFR 53-20 (Sept. 3, 1965).[1] The academic phase of the program is under the supervision of the Air Force Institute of Technology, which is responsible for placing accepted airmen in selected civilian institutions and for their administrative and academic supervision while on campus (*ibid.*).[2] The military phase begins on satisfactory completion of the academic phase, and, after a twelve-week training period, results in a commission at Officer Training School (*ibid.*).

[1] "AFR" (Air Force Regulation) and "AFM" (Air Force Manual) refer to regulations of the Air Force; in light of the differing time periods involved in this case, the date of the applicable regulations is indicated in the references.

[2] Enlisted personnel participating in this program are automatically promoted to Staff Sergeant (pay grade E-5) during the program. AFM 50-5 (Dec. 1965), 3 AECP, para. 16. A person in pay grade E-5, with over three years' service (as petitioner was at the time he began participating in the program at the end of 1965), would earn $250.50 per month in base pay in December 1965. 37 U.S.C. 203 (79 Stat. 545-546).

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In October, 1965, petitioner was notified that he had been accepted in the program; orders were issued designating him an "officer trainee" and assigning him to Arizona State University (App. 4). On December 8, 1965, he was discharged and, on December 9, 1965, he reenlisted for a period of six years in order to meet the retainability requirement for participation in the program.[3]

Petitioner remained in this assignment at Arizona State University under the Airman Education and Commissioning Program until June 17, 1968. On that date, he was removed from the program by the Commandant, Air Force Institute of Technology (App. 13) and demoted to the pay grade (E–3) he had held immediately prior to being selected for the program, in accordane with AFR 39–30, para. 6a (App. 20);[4] he was informed that the basis for removal was his lack of officer potential, as demonstrated by his failure to attend scheduled classes (App. 13, 17, 32). Attendance of all scheduled classes is required by the Air

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[3] AFM 50–5 (July 1965), 3 AECP, para. 15, specifies:

Reenlistment Before Training:

a. On receipt of reassignment instructions from the AFIT, and just before the selectee departs for training, the unit commander will initiate action in accordance with para. 3b, AFR 39–14, to discharge him from his current enlistment and reenlist him for a 6-year period, notwithstanding the provisions of AFM 39–9. * * *

[4] AFM 50–5 (July 1967), 3 AECP, para. 7(a) specifies that "[t]he Commandant, AFIT, is delegated the authority and responsibility for the prompt dismissal of any student who, in his opinion, reveals a lack of academic potential for the course undertaken or fails in any way to measure up to the high standards expected of Air Force officers."

Force regulations unless the serviceman obtains excused absences (App. 26).

Following petitioner's removal, he was ordered to withdraw immediately from the University (App. 13). On July 10, 1968, he was sent a transfer order to report to a new assignment at Moody Air Force Base, Georgia (App. 20). Petitioner complied with this order and, on September 4, 1968, applied for a discharge from active military service (App. 33). The Air Force denied his application on the grounds that "Airman Schlanger was properly eliminated from the AECP", and that, since he "received over two years of college education, at essentially no expense to himself, while drawing pay and allowances from the Air Force, the Air Force is entitled to expect him to comply with his December 1965 enlistment contract" (App. 39).[5]

Since petitioner, at the time of his removal from the program, needed only two more months of classes to obtain a degree from Arizona State University (App. 5), he asked his commanding officer at Moody Air Force Base for an opportunity to return to that university under "Operation Bootstrap," an Air Force program which, *inter alia,* authorizes airmen at

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[5] AFM 50-5 (July 1967), 3 AECP, para. 7c, provides that persons eliminated from the Airman Education and Commissioning Program must serve the remainder of their six-year enlistment:

> c. *Disposition of Eliminees.* An individual dismissed from this program for reasons other than court-martial conviction will be reassigned to complete his 6-year enlistment in accordance with AFM 39-11.

(AFM 39-11 specifies general assignment procedures.)

their own request to attend a university to complete their college education (App. 59; AFM 213-1 (21 June 68), para. 4-1, *et seq.*).

Operation Bootstrap is separate and distinct from the Airman Education and Commissioning Program. Under Operation Bootstrap, an airman who can be released from his normal duties and who can complete the requirements for a baccalaureate degree within one year may be granted permission to attend an accredited college of his choice (AFM 213-1 (June 21, 1968), para. 4-1, *et seq.*); however, the airman must pay his own college expenses (para. 4-5b) and is responsible for all his travel expenses to and from the university (para. 4-5d). While attending college under Operation Bootstrap, the airman is placed in permissive temporary duty status ("permissive TDY"),[6] and consequently is free to terminate his participation in Operation Bootstrap and return to his permanent duty station at any time.[7]

Petitioner was granted permission to participate in Operation Bootstrap. On May 28, 1969, an order was promulgated by Headquarters, Moody Air Force Base, Georgia, assigning petitioner to permissive temporary duty at Tempe, Arizona, for the purpose of attending Arizona State University (App. 51). By its terms, the order "permitted [petitioner] to proceed

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[6] AFM 10-3 (June 1967), para. 2-33, defines "Permissive orders" as "[a]n order permitting an individual to travel as distinguished from an order directing him to travel."

[7] Acceptance for this program is conditioned on an agreement by the airman to extend his active duty commitment for a period three times the length of his temporary duty (AFM 213-1 (June 21, 1968), Table 4-1, Rule 5C).

from Moody AFB, GA. to Arizona State University, Tempe, AZ, effective on or about 4 June 1969 for approximately 70 days for the purpose of attending the University under Operation Bootstrap and then return to Moody AFB, GA." The travel authorized was to be "at no expense to the Government." Petitioner had also requested 15 days delay enroute in conjunction with his attendance under Operation Bootstrap, and this request was granted (App. 59); thus, the order also provided: "Airman is authorized 15 days leave, Leave Address: 2419 N. Saratoga, Tempe, AZ, 85281."[8]

Petitioner attended Arizona State University in the summer of 1969 and obtained his degree. Air Force records reflect petitioner's status during this period of time as the following (App. 46–47):

June 4 through June 14	11 days leave
June 15	TDY for purpose of travel[9]
June 16 through August 22	TDY while attending school 68 days
August 23 through September 19	28 days leave[10]

[8] A "leave address" is an address "at or through" which the Air Force can contact an airman on leave; he is under no obligation to remain physically present at that address (AFM 35–22 (Dec. 1964), para. 46b).

[9] Under AFM 213–1 (June 1968), para. 4–5d, the time spent in travelling to and from the university is charged to TDY instead of against the airman's leave time.

[10] Under the original order of May 28, 1969, petitioner was granted only 15 days leave; consequently, his last day of leave would have been August 26, and, on August 27—the day this suit was brought—he would have been in TDY status for purposes of his return travel to Moody Air Force Base. However, on August 27 he did not return to Moody Air Force Base, but

September 20	TDY for purpose of travel
September 21	Present for duty at Moody Air Force Base [11]

2. On August 27, 1969, after obtaining his undergraduate degree, petitioner commenced this action in the United States District Court for the District of Arizona, alleging that he was unlawfully detained in the Air Force and was entitled to be discharged on the ground that the Air Force, by removing him from the Airman Education and Commissioning Program, had violated the re-enlistment contract of December 9, 1965 (App. 3–9). Named as respondents were the Secretary of the Air Force, Col. Homer Baker, Commander, Moody Air Force Base, Georgia, and Col. Noel B. Reddrick, Commander Air Force ROTC Detachment 25, Arizona State University, Tempe, Arizona. In the terms of the petition (App. 3):

> The Hon. Robert Seamans, Jr., Secretary of the AF and Colonel Homer Baker, Commander, Moody AFB, Georgia, are the persons who are at present unlawfully restraining applicant of his liberty * * *. Col. Reddrick is the ROTC commander at ASU.

The district court, without issuing a show cause order, dismissed the petition *sua sponte* [12] on August 28, 1969

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instead filed this suit in Arizona. By order of September 15, 1969, his 15 days leave time was retroactively extended to 45 days, so as to avoid carrying him in an absent without leave status from Moody Air Force Base during the period after August 27 (App. 50).

[11] Though petitioner did not in fact have to report back to Moody Air Force Base until September 27, 1969, he actually returned on September 21, 1969.

[12] Since the respondents had not been served with the petition, no appearances were made on their behalf.

(App. 40), and denied reconsideration on September 5, 1969. Petitioner, who returned to Moody Air Force Base after the district court's decision, appealed *pro se*. Moody Air Force Base granted him leave time, commencing December 9, 1969 (App. 47), so that he could personally argue his appeal before the Court of Appeals for the Ninth Circuit in San Francisco. On December 12, 1969, following petitioner's argument, the court of appeals issued an order setting aside without prejudice the district court's order and remanding the case to the district court for issuance of an order to show cause and further proceedings (App. 41). Respondents were also stayed from removing petitioner from the jurisdiction until completion of the proceedings in the district court (App. 43).

On remand, the district court issued the show cause order on January 8, 1970 (App. 42). Respondents appeared specially by counsel, and filed a motion to dismiss the petition for lack of personal jurisdiction over them (App. 44). This motion was granted on February 10, 1970 (App. 65), the court ruling that no person having custody of petitioner was within the district court's jurisdiction. The stay order barring removal of petitioner from the jurisdiction was continued pending appeal (App. 67).

The court of appeals on May 20, 1970, affirmed *per curiam* (App. 68) on the basis of its decision in *Jarrett* v. *Resor*, 426 F.2d 213 (C.A. 9). In *Jarrett*, the court had ruled that "[a] member of the Armed Forces who is voluntarily in a place other than an assigned post is not in custody in that place" (426 F.2d at 217) for purposes of habeas corpus jurisdiction.

A petition for rehearing was filed on June 3, 1970 (App. 69), and denied on June 17, 1970 (App. 80); however, the court of appeals granted petitioner an additional stay until July 2, 1970 (App. 81). On the expiration of that stay, which Mr. Justice Black refused to continue, petitioner was ordered to resume his regular duties at Moody Air Force Base, Georgia.[13]

SUMMARY OF ARGUMENT

I

Petitioner commenced this action in the United States District Court for the District of Arizona, while on leave from his assigned duty station at Moody Air Force Base, Georgia. Under 28 U.S.C. 2241, he was clearly "in custody" in the United States Air Force at the time he sought habeas corpus relief. He was not, however, being detained in the State of Arizona, but indeed had gone to that jurisdiction, at his own expense, only because he personally chose to complete his final college semester at Arizona State University under a special Air Force program called "Operation Bootstrap"; he voluntarily remained there on leave after receiving his degree, and it was then that the petition was filed.

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[13] Upon his return to Georgia, petitioner filed a petition for a writ of habeas corpus in the District Court for the Middle District of Georgia. On August 18, 1970, the district court dismissed the case on the ground that petitioner had failed to exhaust his administrative remedies. This case is now pending on appeal, C.A. 5, No. 30480. By order of November 5, 1970, the court of appeals deferred consideration of the appeal pending determination of this case.

This Court has long recognized that a district court may only inquire into the cause of restraints on liberty of those confined or restrained within its territorial jurisdiction. *Ahrens* v. *Clark,* 335 U.S. 188. The need for adherence to that principle in cases of this sort is amply demonstrated by the present proceedings. For, if a serviceman on active duty is permitted, while on leave, to bring a habeas corpus action in any judicial district he chooses, he can successfully obtain, *pendente lite,* release from his assigned military duties at his permanent base during the pendency of his case, with resulting unnecessary interference with military operations. Nor, as a matter of judicial policy, should a serviceman be permitted to shop for a judicial forum which he believes will be especially receptive to his habeas corpus claim. Petitioner at all pertinent times has had available a suitable forum for habeas corpus in Georgia, where he in fact filed a subsequent petition.

II

Similarly, a serviceman such as petitioner should be required to comply with the requirement embodied in 28 U.S.C. 2243, that the writ of habeas corpus "be directed to the person having custody of the person detained." As construed by this Court in *Wales* v. *Whitney,* 114 U.S. 564, this provision requires that the person having immediate custody of the petitioner must be within the jurisdiction of the district court. 28 U.S.C. 1391(e), on which petitioner relies, does not eliminate this special habeas corpus requirement.

In the instant case, petitioner's immediate command-

er was located at Moody Air Force Base, Georgia; he was not in Arizona. The Secretary of the Air Force, also named as a respondent, had his official residence at Washington. Only Col. Reddrick, the ROTC commander at Arizona State University, was within the territorial limits of the Arizona court; however, he concededly had no custody or control over petitioner. Since both his custody and his custodian were in Georgia, petitioner should properly be remitted to his remedies there.

ARGUMENT

I

A SERVICEMAN ON ACTIVE MILITARY DUTY MUST SEEK HABEAS CORPUS RELIEF IN THE JUDICIAL DISTRICT WHERE HIS ASSIGNED DUTY STATION IS LOCATED, EVEN WHEN HE IS IN LEAVE STATUS

In general, the law of habeas corpus has evolved in cases brought by prisoners seeking release from imprisonment on criminal convictions. *E.g., Fay* v. *Noia,* 372 U.S. 391. However, "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones* v. *Cunningham,* 371 U.S. 236, 240. Consequently, it has long been recognized that this writ is the appropriate remedy for servicemen who claim to be unlawfully detained in the Armed Forces. *E.g., In re Grimley,* 137 U.S. 147; *Eagles* v. *Samuels,* 329 U.S. 304; *Oestereich* v. *Selective Service Board,* 393 U.S.

233, 235." Such persons are, as a practical matter, "in custody" as that term is used in 28 U.S.C. 2241, in the sense that they are subject to military orders and control which act as a restraint on their freedom of movement. See *Jones* v. *Cunningham, supra,* 371 U.S. at 240.

The question presented in the instant case does not concern the appropriateness of the remedy of habeas corpus for servicemen seeking discharge. That is agreed upon by the parties. Rather, what is in issue here is the proper jurisdiction in which such a petition for a writ of habeas corpus should be brought by a serviceman in active military service.

A

Congress has provided that "[w]rits of habeas corpus may be granted by * * * the district courts * * * within their respective jurisdictions." 28 U.S.C. 2241. In passing on the intended meaning of this language, this Court, in *Ahrens* v. *Clark,* 335 U.S. 188, ruled that habeas corpus jurisdiction of the district courts is limited "to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts." 335 U.S. at 190. It went on to point out that (335 U.S. at 190–191):

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[14] Similarly, see, *e.g.*, *Hammond* v. *Lenfest,* 398 F. 2d 705 (C.A. 2); *United States ex rel. Brooks* v. *Clifford,* 409 F. 2d 700 (C.A. 4), rehearing denied, 412 F. 2d 1137; *Morgan* v. *Underwood,* 406 F. 2d 1253 (C.A. 5), certiorari denied *sub nom. Lizarraga* v. *Underwood,* 396 U.S. 944; *Brown* v. *McNamara,* 387 F. 2d 150, 152 (C.A. 3), certiorari denied *sub nom. Brown* v. *Clifford,* 390 U.S. 1005.

> * * * [T]he statutory scheme contemplates a procedure which may bring the prisoner before the court. * * * It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages.

This interpretation is supported by the legislative history of the habeas corpus statute (335 U.S. at 191; but see 335 U.S. at 204–206 (Rutledge, J., dissenting)), and, as carefully noted in *Ahrens* (335 U.S. at 192–193), if the statutory scheme is to be altered so as to afford "district courts discretion in cases like this," the responsibility for making such a change lies with Congress, not with the courts. See also *Carbo* v. *United States,* 364 U.S. 611. Thus, subsequent decisions have continued to recognize the strictly jurisdictional nature of the requirement that a district court may issue a writ of habeas corpus only if the petitioner is detained within the boundaries of its district. *George* v. *Nelson,* 410 F. 2d 1179 (C.A. 9), affirmed on other grounds, 399 U.S. 224; *United States ex rel. Van Scoten* v. *Commonwealth of Pa.,* 404 F. 2d 767 (C.A. 3); *Webb* v. *Beto,* 362 F. 2d 105 (C.A. 5); *Whiting* v. *Chew,* 273 F. 2d 885 (C.A. 4); but see *Word* v. *North Carolina,* 406 F. 2d 352,

358-361 (C.A. 4). Compare *United States ex rel. Meadows* v. *State of New York*, 426 F. 2d 1176 (C.A. 2).[15]

Significantly, Congress has been most reluctant to import into the statute any relaxation of this jurisdictional requirement for habeas corpus relief. Separate legislation (28 U.S.C. 2255[16]) has been enacted to provide a forum for a challenge to a criminal conviction in the sentencing court by a federal prisoner "in custody" elsewhere. But this Court emphasized, in *United States* v. *Hayman*, 342 U.S. 205, 220, that Section 2255 did not change the principle

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[15] In this regard, we note that in 1948 there was added in 28 U.S.C. 2242 the requirement that any habeas petition addressed to an appellate judge "state the reasons for not making application to the district court of the district in which the applicant is held." 62 Stat. 965. This language reinforces the principle that only the district court for the district of confinement has jurisdiction over a petition.

[16] 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

of *Ahrens* that a habeas corpus action "required the presence of the prisoner within the territorial jurisdiction of the District Court"; it simply establishes a new remedy that "is not a habeas corpus proceeding" (*ibid*). See also *Kaufman* v. *United States*, 394 U.S. 217. Congress did make a narrow exception to the jurisdictional limit recognized in *Ahrens* in a 1966 amendment which allows a state prisoner to seek habeas corpus in the district where he was sentenced, as well as in the district where he is confined, so long as both are within the same State. 28 U.S.C. (Supp. V) 2241 (d);[17] see also 28 U.S.C. (Supp. V) 2254. However, this Court has noted that the legislative history of this limited exception "suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to the extent that it was not altered by [the 1966] amendments." *Nelson* v. *George*, 399 U.S. 224, 228 n. 5; see also H. Rep. No. 1894, 89th Cong., 2d Sess., pp. 2, 4; S. Rep. No. 1502, 89th Cong., 2d Sess.

Consequently, in the absence of any legislative mandate to the contrary, there is no basis for any deviation from the strict requirement that a serviceman

[17] 28 U.S.C. (Supp. V) 2241(d) provides:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application.***

seeking to obtain release from active military service file his petition in the district where that service "confines" him. Ordinarily, each serviceman in the Armed Forces is assigned to a specific military post, and generally he is required to be present at his duty station each work-day. Only when he is on leave, or otherwise has permission to be away from his duty station, is he free to travel elsewhere. Plainly, without the territorial rule of *Ahrens*, a serviceman would be able properly to file a habeas corpus petition while in leave status in a judicial district other than the one in which his duty station is located.[18] His presence would most likely then be required in that district court so that the merits of his petition may be resolved. See 28 U.S.C. 2243. This would be so especially if, as here, the petition is prosecuted *pro se*. And this is true notwithstanding the fact that during the course of the proceedings the serviceman's leave, or his permission otherwise to be absent from his duty station, terminates, and his services at his duty station are needed again. The military would thus be faced with the alternatives of either transporting the applicant from his duty station to the appropriate judicial district each time his presence is required in court (assuming the court permits him to be ordered back to his duty

[18] If the Court were to accept petitioner's suggestion—which we discuss *infra*, pp. 27–29—that there need not be a proper custodian within the jurisdiction of the district court that issued the writ, the serviceman could shop around for any forum he believes might be most receptive to his claim (see pp. 22–24, *infra*). Indeed, it is not clear that, under petitioner's approach, there would be any barrier to a serviceman's filing a petition—by mail or through counsel—in a foreign district even while he is on duty at his regular station.

station while his petition is pending), or simply extending his leave time to allow him to be absent from his duty station during the course of the habeas corpus proceedings.[19]

It must, of course, be assumed, until proved otherwise, that a person in military service is validly there and the military has the right to his services. See *e.g.*, *United States* v. *Chemical Foundation*, 272 U.S. 1, 14–15; *In re Grimley*, 137 U.S. 147, 150–152. However, if a serviceman is permitted to seek habeas corpus relief in judicial districts other than where his duty station is located, it will, at the very least, create a serious potential for widespread avoidance of duty assignments. The instant case highlights the point. Petitioner, through the filing of his original petition in Arizona instead of Georgia, where his duty station is located, has already succeeded in obtaining relief *pendente lite* from his military duty assignment for more than six months.[20] The undesirability of such im-

[19] In the instant case petitioner was placed by the Air Force in leave status. Upon termination of the maximum amount of paid leave time allowable, he was placed in "excess leave" status, during which, under Air Force regulations, a member is not entitled to pay and allowances. See AFM 35–22 (Dec. 1964), Ch. 1, para. 6.

[20] The day after petitioner filed his habeas corpus petition, the Arizona district court improperly dismissed the action *ex parte* and without a hearing. Petitioner then returned, on September 21, 1969, to Moody Air Force Base and noted an appeal *pro se* from the district court's decision. He was granted permission by the Air Force to go to San Francisco in December 1969 to argue his case in the Ninth Circuit. That court determined that the *ex parte* action by the district court had been improper and, on December 12, 1969, remanded the case without prejudice to the district court. An order was entered

pairment of military opera ions by judicial proceed-
ings has been noted by this Court in another context.
In *Orloff* v. *Willoughby*, 3 5 U.S. 83, the Court re-
fused to consider a doctor's challenge to his duty as-
signment as improper and discriminatory, observing
(345 U.S. at 94–95), that—

> Orloff was ordered sent to the Far East
> Command, where the United States is now en-
> gaged in combat. By reason of these proceed-
> ings, he has remaine in the United States and
> successfully avoided foreign service until his
> period of induction s almost past. * * * It is
> not difficult to see hat the exercise of such
> jurisdiction as is her urged would be a disrup-
> tive force as to aff irs peculiarly within the
> jurisdiction of the m litary authorities.

In *Ahrens*, this Court reas ed that the habeas corpus
statute "contemplates a p ocedure which may bring
the prisoner before the c urt. * * * It would take
compelling reasons to conc ude that Congress contem-
plated the production of risoners from remote sec-
tions, perhaps thousands f miles from the District
Court that issued the wr t." 335 U.S. at 190–191.
Similarly, the same statut ry scheme precludes such
disruptions by reason of hal as corpus suits seeking dis-
charge from military servi .

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by the Ninth Circuit Court of Appeals at that time enjoining
the Air Force from removing titioner from Arizona pending
disposition of his case by the district court; subsequent stays
were also issued during the co se of the next round of appel-
late proceedings (App. 43, 67, 31). Only after petitioner had
lost on the second appeal, reh ring had been denied, and Mr.
Justice Black had denied his m tion to continue the stay order
beyond July 2, 1970, could the Air Force require petitioner to
return to his duty station at oody Air Force Base, Georgia.

But it is not this disruptive force on military operations alone that requires adherence to the territorial rule of *Ahrens* in cases of this sort. There is also the sound judicial policy of discouraging a litigant's natural desire to "shop around" for the judicial forum that appears most favorably disposed to the position he has taken. Such forum shopping would inevitably result if petitioner were to prevail here, for the jurisdictional rule he urges would permit a serviceman on active duty, while on leave from his assigned duty station, to file his habeas corpus petition in any judicial district he chooses on the theory that military "custody" can be deemed to exist wherever "its effects are felt" rather than where the immediate authority is actually exercised (Pet. Br. 10–11). Cf. *McKay* v. *Secretary of United States Air Force*, 306 F. Supp. 1252 (D. Mass.); *McKay* v. *Seamans*, D. D.C., No. H.C.-255–69, decided, December 4, 1969, affirmed, C.A.D.C. No. 23736, decided, December 4, 1969; *United States ex rel Olsen* v. *Laird*, M.D. N.C., No. C–165–8–70, decided, December 2, 1970.

It is difficult to perceive a rational basis for such a novel proposition. The traditional concepts of habeas corpus jurisdiction do not deprive a serviceman on active duty of a judicial forum in which to assert his claim,[21] or impose on him any substantial burdens

[21] Even where a serviceman is stationed overseas, he is, for purposes of habeas corpus jurisdiction, considered to be "in custody" within the District of Columbia, and thus he may properly maintain a suit there seeking discharge from active military service so long as there is a proper respondent custodian within the reach of the court's process. See, *e.g.*, *Wilson* v. *Girard*, 354 U.S. 524; *Daoust* v. *Laird*, D.C. C.A., No. 23944, decided September 3, 1970; *United States ex rel. Barr* v. *Resor*, 309

that he is able to avoid by bringing his action elsewhere. The situation is not comparable to that of a prisoner who finds himself in custody in a jurisdiction different from that in which the court imposing sentence is located (*supra,* pp. 17–18). Plainly, if, on the facts of this case, petitioner had waited one more day and reported to Moody Air Force Base on August 28, 1969, as ordered, he could have as easily commenced habeas corpus proceedings in the United States District Court for the Middle District of Georgia—the jurisdiction in which all his records were kept and his commanding officer was located—just as he later decided to do after returning to his regular duty station in July 1970 (*supra* n. 13).

Thus, even if the balance of convenience to the serviceman, the military and the courts were the basis upon which this case should be decided, there is nothing in the circumstances of this case—or in any other case that has been suggested—that would warrant the fashioning of a rule permitting habeas corpus to be sought in any district other than that of the petitioner's military station. In any event, any such argument would have to be directed to Congress and not to the courts, since, as we noted at the outset, the restriction of habeas corpus to the district of confinement is

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F. Supp. 917 (D. D.C.); *Keeple* v. *Laird*, D. D.C., H.C. No. 14–70, decided April 1, 1970. This question was specifically reserved in *Ahrens*, 335 U.S. at 192, n. 4.

Nor, in our view, do the traditional concepts of habeas corpus jurisdiction need to deprive a serviceman on active duty of an opportunity to maintain a suit for discharge in the unusual situation, not presented here, where his assigned duty station is located in a jurisdiction other than the one where his immediate commander is stationed. See *infra*, n. 28.

a jurisdictional requirement arising directly from the statute.

Those courts of appeals which have considered the question have consistently recognized the continuing validity of the *Ahrens* jurisdictional principle in the field of military habeas corpus. Thus, in *United States ex rel. Rudick* v. *Laird,* 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918, a suit filed by a serviceman in New York while on leave between two duty assignments in California, the Second Circuit held that the New York district court was without jurisdiction since petitioner was not "in custody" there, but was in New York on his own volition. Similarly, in *Jarrett* v. *Resor,* 426 F. 2d 213 (C.A. 9), followed by the court of appeals below, a serviceman whose duty station was located at Fort Knox, Kentucky, was not permitted to commence habeas corpus proceedings while on leave in the Northern District of California; as the court there stated (426 F. 2d at 217): "A member of the Armed Forces who is voluntarily in a place other than an assigned post is not in custody in that place." And see *Duncan* v. *State of Maine,* 295 F. 2d 528, 530 (C.A. 1), certiorari denied, 368 U.S. 998; *Ginyard* v. *Clemmer,* 357 F. 2d 291, 292-293 (C.A.D.C.); *Wurster* v. *Perrin,* 303 F. Supp. 480 (D. P.R.); *Morales Crespo* v. *Perrin,* 309 F. Supp. 203 (D. P.R.); *Weber* v. *Clifford,* 289 F. Supp. 960 (D. Md.); *Orloff* v. *Lovett,* 101 F. Supp. 750 (D. D.C.).[22] In addition, *Hammond* v. *Lenfest,* 398

[22] Cf. *Laxer* v. *Cushman,* 300 F. Supp. 920, 924 n. 5 (D. Mass.). Contra: *United States ex rel. Lohmeyer* v. *Laird,* 3 SSLR 3072 (D. Md.).

F. 2d 705 (C.A. 2), a suit brought by a serviceman not on active duty, but in the Naval reserves, reaches a similar conclusion. The judicial district there held to have habeas corpus jurisdiction was the one in which his assigned reserve unit to which he reported monthly was located (398 F. 2d at 707). And see *McKay* v. *Secretary of United States Air Force,* 306 F. Supp. 1252 (D. Mass.); *Silberberg* v. *Willis,* 306 F. Supp. 1013, 1020 (D. Mass.), reversed on other grounds, 420 F. 2d 662 (C.A. 1); *Nason* v. *Secretary of Army,* 304 F. Supp. 422 (D. Mass.).[23]

B.

We turn, then, to the question whether the jurisdictional requirement has been met in the instant case. At the time petitioner filed his habeas corpus petition in Arizona he was concededly (App. 58, 59) on leave from his permanent duty station at Moody Air Force Base, Georgia. His status was thus markedly different from what it would have been had he not been withdrawn from the Airman Education

[23] The case of *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md.), presents a unique situation, wholly distinguishable from the instant case on its facts. There the petitioner, a reserve officer, had been "placed on inactive status and deferred in order that he might pursue graduate study in chemistry at Johns Hopkins University" (308 F. Supp. at 450). At the time he filed his habeas corpus petition he was not on leave from a permanent duty station; indeed, unlike petitioner here, Donigian was "attached to no unit" and had no "ascertainable duty stations" (308 F. Supp. at 453). Even there, however, it is instructive to note that the court, in sustaining jurisdiction emphasized that "the custody of which [Donigian] complains relates very definitely to this district" (308 F. Supp. at 453). And see *infra* n. 28.

and Commissioning Program. As earlier indicated (*supra,* pp. 5, 6–7), by the terms of that program, the Air Force Institute of Technology assigns an airman to a participating civilian institution and "[a]ttendance at scheduled classes is the direct counterpart of reporting to duty or to a military formation under normal duty conditions" (App. 26). Accordingly, petitioner, before being removed from AECP in 1968, was admittedly stationed at Arizona State University in Arizona.

When, however, he was withdrawn from that program and reassigned to Moody Air Force Base, his only duty station was in Georgia. His return to the Arizona campus almost a year later under Operation Bootstrap, though with the Air Force's permission, was of his own choosing and at his own expense, and in no sense could he be considered stationed there. The permissive TDY (temporary duty) status he was given merely relieved him of duty assignments in Georgia while he was completing the final semester of classes. It was, in essence, the equivalent of an extended leave; petitioner was not required to report to anyone in Arizona, he was not there to perform any military duties, nor was he under the supervision of any Air Force personnel who might have been stationed there.[24] In any event, once he received his degree, the sole purpose for his sojourn in Arizona had been realized and he was then in no different posture than

[24] Petitioner was thus free to miss scheduled classes under the Operation Bootstrap program, something he was not permitted to do at the time he was attending the university under Air Force supervision (*supra* p. 6).

any other serviceman on leave from Moody Air Force Base; it was at this time that the petition was filed. Plainly, as petitioner states (Pet. Br. 11), "he was lawfully present in Arizona"; but just as clearly, he was not then "in custody" within that judicial district for purposes of habeas corpus jurisdiction.

II

THE DISTRICT COURT PROPERLY DECLINED TO ENTERTAIN PETITIONER'S APPLICATION BECAUSE HE HAD NO COMMANDING OFFICER WITHIN THE DISTRICT

A. *The Arizona court lacks jurisdiction under 28 U.S.C. 2243.*

Even assuming *arguendo* that there is in this case jurisdiction to the extent that the petitioner is "in custody" within the territorial limits of the Arizona district court, there is another reason why the action must fail. Section 2243 of Title 28 specifies that the writ of habeas corpus "shall be directed to the person having custody of the person detained." This statutory language, as it originally appeared in the Act of February 5, 1867, ch. 28, Sec. 1, 14 Stat. 385, was interpreted by this Court as requiring that a person having immediate custody over the petitioner must be subject to the jurisdiction of the court issuing the writ. *Wales* v. *Whitney,* 114 U.S. 564, 574. And the Court has more recently recognized this prerequisite for habeas corpus jurisdiction. See *Ex Parte Endo,* 323 U.S. 283, 306–307; *Jones* v. *Cunningham,* 371 U.S. 236, 244. And see, *Ahrens* v. *Clark,* 335 U.S. at 198–205 (Rutledge, J. dissenting).

Applying this principle, courts of appeals faced with the question whether a serviceman on active duty can maintain habeas corpus proceedings in a particular judicial district have correctly looked to see, *inter alia,* if a proper respondent custodian is within reach of the court's process. See, *e.g., United States ex rel. Rudick* v. *United States,* 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; *United States ex rel. Keefe* v. *Dulles,* 222 F. 2d 390 (C.A.D.C.), certiorari denied, 348 U.S. 952. Such an examination in the instant case reveals that this jurisdictional requirement cannot be met.

The respondents to this suit are (1) the Secretary of the Air Force, (2) Colonel Homer Baker, the commander of Moody Air Force Base, Georgia, and (3) Colonel Noel Reddrick, the commander of the Reserve Officer Training Corps at Arizona State University. Of the three, Col. Reddrick was the only one physically present within the jurisdiction of the Arizona district court at the time the action was commenced. However, as petitioner readily concedes (App. 3), Col. Reddrick's command authority was limited to the ROTC program at the university. He had no custody or control over petitioner by virtue of the fact that petitioner chose to attend classes on the Arizona State campus under Operation Bootstrap (*supra,* p. 10). Petitioner was not in the ROTC, at Arizona State, or elsewhere. See, *e.g., Donigian* v. *Laird,* 308 F. Supp. 449, 452 (D. Md.). Indeed, even assuming the contrary, it is clear that any custody or control Col. Reddrick might have had would have terminated at the

time petitioner received his degree and would not have extended to the subsequent leave time from Moody Air Force Base, on the last day of which this petition was filed.

The person who did have custody and control over petitioner was Col. Baker, his commanding officer in Georgia. But he was neither a resident of the judicial district in question nor amenable to its process. While it was Col. Baker who granted petitioner's request for permissive TDY (at a time when petitioner was in Georgia), who had authority to recall petitioner in the event of a national emergency, and who was the commander to whom petitioner was required to report on his return to Moody Air Force Base, Col. Baker was not a person over whom the Arizona court had jurisdiction so as to order him to carry out its mandate.

The same can be said for the Secretary of the Air Force, whose official residence is at Air Force headquarters in Washington. See, *e.g., Donigian* v. *Laird,* 308 F. Supp. 449, 452 (D. Md.). If he could be sued in Arizona for purposes of the present action, it would, as expressed in a related context in *United States ex rel Rudick* v. *Laird, supra,* 412 F. 2d at 21, suggest the following anomaly:

> * * * a soldier seeking habeas corpus relief would not be required to bring suit against his commanding officer where he is stationed and presumably where his pertinent files are located. Instead, he would be entitled to sue the Secretary of the [Air Force] * * * in any forum of his own choosing anywhere in the United States.

B. *28 U.S.C. 1391(e) does not affect the jurisdictional requirements for habeas corpus.*

Petitioner and *amicus* argue that the Secretary and Col. Baker could properly be named as respondents in the Arizona district court (assuming custody there) under the 1962 amendment adding 28 U.S.C. 1391(e), P.L. 87-748 (76 Stat. 744), which provides that

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be by certified mail beyond the territorial limits of the district in which the action is brought.

1. Even if Section 1391(e) applied to habeas corpus proceedings—and we shall contend that it does not—it would not permit petitioner to sue in Arizona on the facts of this case. As indicated above (*supra* pp. 28-29), there is not a defendant with custody and control over petitioner who resides in Arizona; nor is this an action involving real property situated in that state. Since the cause of action is not one for breach

of contract—although petitioner asserts as a ground for discharge that the Air Force violated his re-enlistment contract of December 9, 1965—but rather is an habeas corpus action charging unlawful detention, it arose not in Arizona, but in Georgia where petitioner was in fact being "detained" at the time he commenced his suit (see *supra* pp. 25–27). And, finally, petitioner's place of residence cannot properly be considered to be in Arizona.[25] When he went to that jurisdiction under Operation Bootstrap, it was solely to attend his final semester of classes at Arizona State University, from June 16 through August 22, 1969 (*supra* p. 9). Thereafter, as earlier indicated, he remained in Arizona only because it was there that he chose to spend his last five days of leave from his permanent duty station at Moody Air Force Base. His place of residence throughout this period, however, was in Georgia, the state to which he was required to return after receiving his college degree and in which he was committed to remain during the last 2½ years, or so, of his military service, or until ordered to a new duty station.[26]

2. In any event, Section 1391(e) does not affect the jurisdictional requirements for habeas corpus. It was enacted expressly "to make it possible to bring actions against Government officials and agencies in

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[25] On all petitioner's Air Force personnel records, his "Home of Record" is at 30 Doagan Place, New York, New York.

[26] We have been advised that petitioner has recently received orders to report to a new duty station in Iceland shortly after this Court hears oral argument in this case. He still has over one year to serve.

U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." H. Rep. No. 536, 87th Cong., 1st Sess., p. 1; S. Rep. No. 1992, 87th Cong., 2d Sess., p. 2; and see 107 Cong. Rec. 12157; 108 Cong. Rec. 18783, 20093–20094. But there never has been any such limitation on habeas corpus actions, which can be brought (even by servicemen on active duty) against the appropriate custodians in federal district courts throughout the country; thus, there was never any need for Section 1391(e) in habeas corpus proceedings, and there is nothing in the legislative history to suggest that habeas corpus proceedings were ever contemplated as being within the ambit of this amendment. Indeed, the explicit reference in the 1962 legislation to the Federal Rules of Civil Procedure—which at that time expressly excluded habeas corpus proceedings from their reach (Rule 81(a)(2), Fed. R. Civ. P.)—reinforces this reading. See *Harris* v. *Nelson*, 394 U.S. 286, 294.[27]

As this Court observed in *Harris* v. *Nelson, supra*, the fact that habeas corpus proceedings are for some purposes characterized as "civil" does not automatically mean that the procedures applicable to them are identical with those provided for conventional civil

[27] As this Court noted in *Harris* v. *Nelson* (394 U.S. at 293 n. 3), Rule 81(a)(2) has since been amended, effective July 1, 1968, to read, "These rules [the Federal Rules of Civil Procedure] are applicable to proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Obviously, this action did not amount to an amendment of Section 1391(e).

actions. "[T]he [civil] label is gross and inexact. Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense." 394 U.S. at 293–294 (footnote omitted). In light of the fact that the habeas corpus statutes create—as we have pointed out—a unique requirement for personal jurisdiction over a custodian, it should not lightly be inferred that a general venue statute, focused on a different problem altogether, inadvertently modifies that specific requirement. See *United States ex rel. Rudick* v. *Laird, supra,* 412 F. 2d at 20.

To be sure, there may be situations where a rigid requirement that both custody and custodian be in the same district would present difficulties in applying the habeas corpus remedy. But in those situations a suitable remedy can be fashioned *within* the habeas corpus system, in accordance with the principle recognized in *Harris* v. *Nelson* that "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." 394 U.S. at 291.[25] But that does not

[25] Such a situation would be presented by an occasional serviceman who, unlike petitioner here, is *stationed* at an isolated location in a district where there is no commanding officer; such a serviceman might well be allowed—in the exercise of the flexibility inherent in the statutory scheme—to file his habeas corpus petition in the district of his "custody," *i.e.*, where he is stationed, with extraterritorial jurisdiction over the person of his immediate commanding officer. Otherwise there would be no district in which a petition could be filed.

Similar considerations led to the result in *Donigian* v. *Laird, supra,* involving a reserve officer, located in the district of Maryland, who had no custodian in any real sense other than the

mean that the well established principles of habeas corpus jurisdiction should be abandoned wholesale, which would be the result of a blind application of the literal language of Section 1391(e). As we have contended, no exception to the established principles of habeas corpus jurisdiction is necessary to provide a fair remedy in petitioner's situation, since both his custody and his custodian were at the pertinent time in Georgia, where he in fact now has a separate habeas corpus action pending (see n. 13, *supra*). He should be remitted to his remedies in that district, where both of the prerequisites lacking in the present case are met.

C. *In any event, the action should be transferred under 28 U.S.C. 1404(a).*

Even if the Court should find that the Arizona district court does have jurisdiction to entertain the instant petition, it seems obvious that the case should be transferred to the Middle District of Georgia under 28 U.S.C. 1404(a), and the direction for remand should be without prejudice to the filing of a motion under that provision. Cf. *United States ex rel. Meadows* v. *State of New York*, 426 F. 2d 1176, 1183–1184 n.

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commander of the personnel center for reservists in Indiana. In this admittedly "highly unusual situation" (308 F. Supp. at 453)—where there was no concurrence of custody and custodian in any district in the United States—the court allowed a petition to be filed in the district where the reserve officer was at the time actually attending graduate school, with the Army's permission, and where at least part of the military's processing of his discharge application had taken place. See n. 23, *supra*. We disagree, of course, with the *Donigian* court's reliance upon Section 1391(e), and with the similar lower court decisions in two other districts upon which petitioner relies (Pet. Br. 17).

9 (C.A. 2). As we have pointed out, the balance of convenience to the serviceman, the military and the courts amply demonstrates the propriety of an application of the *forum non conveniens* principle in the circumstances of this case.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

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FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

No. 5481

Petition for rehearing not granted.